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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MARTIN F. SLONIMSKY, as General Partner and/or Record Custodian of NATIONAL BUSINESS RESEARCH CO. EIN#77-0315950, as President and/or Record Custodian of NATIONAL BUSINESS RESEARCH CO. FL Corp. No. 96000002478, as General Partner and/or Record Custodian of NATIONAL BUSINESS RESEARCH COMPANY LTD EIN 85-0683044,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a former employee could successfully assert a Fifth Amendment act-of-production privilege to avoid producing documents of a closed corporation?

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The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit is set forth in Appendix A. The order of the United States District Court for the Southern District of Florida Granting Petition to Enforce IRS Summonses is set forth in Appendix B.

STATEMENT OF JURISDICTION

This is a Petition for a Writ of Certiorari from the final order entered by the United States Court of Appeals for the Eleventh Circuit on July 6, 2001 in accord with 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[no] person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Court Below and Statement of the Facts.

A. Procedural Facts

The government filed a Petition to Enforce Internal Revenue Service Summons as to Martin Slonimsky. Mr. Slonimsky objected and filed an Objection to the Government's Petition to Enforce Internal Revenue Service Summons and Incorporated Memorandum of Law. On August 18, 2000, a hearing was held in this matter before the United

States District Court for the Southern District of Florida whereby Mr. Slonimsky objected to the turning over of any corporate records based on his Fifth Amendment act of production privilege. Consequently, the district court issued an Order Granting Petition to Enforce IRS Summonses and denying Mr. Slonimsky's *ore tenus* motion for a stay of its ruling pending appeal. Mr. Slonimsky filed a timely Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. The appellate court had jurisdiction pursuant to 28 U.S.C. § 1291.

The Eleventh Circuit Court of Appeals entered a judgment affirming the district court on July 6, 2001.

B. Substantive Facts

On March 21, 2000, Special Agent George Brito of the Internal Revenue Service issued an Internal Revenue Service summons to Martin F. Slonimsky as general partner and/or records custodian of National Business Research Co. (EIN #77-0315950). Also on March 21, 2000, Special Agent Brito issued an Internal Revenue Service summons to Martin F. Slonimsky as president and/or records custodian of National Business Research Co. (FL Corp. #96000002478). The two summonses for records from National Business Research Co. apply to one corporate entity. Additionally on that date, March 21, 2000, Special Agent Brito issued a third summons to Martin F. Slonimsky as general partner and/or records custodian of National Business Research Company LTD (EIN #65-0683044). These three summonses were properly served on Mr. Slonimsky.

The Articles of Incorporation of National Business Research Co. were first filed with the Secretary of State as a

Florida for Profit Corporation on January 4, 1996. National Business Research Co. was voluntarily dissolved and the dissolution was properly filed with the Secretary of State on March 18, 1996. National Business Research Company, LTD., on the other hand, made the appropriate filings with the Secretary of State on November 18, 1996. National Business Research Company, LTD. was revoked as a corporation in Florida for failure to file an annual report on April 10, 1998. Both of these corporations are no longer in existence and are closed. The three summonses served in this cause relate to these two stated corporations.

In the fall of 1996, a lawsuit was filed in the state Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida styled *Office of the Attorney General, Department of Legal Affairs, State of Florida, v. National Business Research Co., a dissolved Florida corporation, a/k/a American Private Publications, Gabriel Slonimsky, and Martin Slonimsky*, Case No. 96-22900 CA-02. There was an Agreed Permanent Injunction and Final Judgment ordered and signed by the court on March 25, 1997. The order of Permanent Injunction of March 25, 1997 states in pertinent part that,

> . . . [s]aid Defendants agree that they are restrained and enjoined from: . . .
>
> c) Owning, operating, participating in, controlling, directing, supervising, being employed at, or having any involvement in any business or entity that engages in telemarketing sales and envelope stuffing, as well as any business that sells or offers to sell any other type of work-at-home products or services, within the

> State of Florida or that contacts or sells such services or products to Florida consumers.
>
> 3. Defendants state that they have ceased all mailings, written and oral solicitations, and other promotional efforts effective December 5, 1996. Defendants further ceased accepting orders for goods or services as of February 7, 1997.

Thus, by agreement and through the force of a court order, the two companies named in the subject summonses were mandated closed years before the subject summonses were ever prepared and served. The filing of this Agreed Permanent Injunction and Final Judgment followed the dissolution of National Business Research Co.

REASONS FOR GRANTING THE WRIT

A FORMER EMPLOYEE COULD SUCCESSFULLY ASSERT A FIFTH AMENDMENT ACT-OF-PRODUCTION PRIVILEGE TO AVOID PRODUCING DOCUMENTS OF A CLOSED CORPORATION.

Under the Fifth Amendment, "[n]o person ... shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. Moreover, the Fifth Amendment privilege against compelled self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *see also United States v. Argomaniz*, 925 F.2d 1349, 1352-1353 (11th Cir. 1991). Finally, in responding to requests for information in an Internal Revenue Service ("I.R.S.") investigation, a taxpayer may invoke the privilege. *Argomaniz*, 925 F.2d at 1353.

Mr. Slonimsky was served with three Internal Revenue Service summonses requesting that he produce corporate documents. Mr. Slonimsky's compliance with the summonses and his act of production might provide information incriminating to Mr. Slonimsky. Mr. Slonimsky, who was under criminal investigation by criminal investigators of the I.R.S., showed that there were "substantial and real hazards of self-incrimination," and, thus, the Fifth Amendment should have shielded him from compliance with the I.R.S. summonses. *Id.* Like the Petitioner in *Argomaniz*, if Mr. Slonimsky were to produce the documents called for in the summonses, he "would be establishing the existence and authenticity of the documents listed in the summons[es], as well as verifying that these documents were in his possession." *Id.* at 1356 (citing *Doe v. United States*, 487 U.S. 201, 209 (1987)).

At the time Mr. Slonimsky was served, and continuing through the present, Mr. Slonimsky was no longer a general partner, officer, nor records custodian of either National Business Research Co. or National Research Company Limited. Additionally, the corporations were already closed by the time Mr. Slonimsky was served with the summonses. As such, Mr. Slonimsky objects to the enforcement of these stated three summonses based on his Fifth Amendment privilege.

There are a number of United States Supreme Court and appellate court cases which analyze the pertinent law and validate this argument and the objection herein. Two cardinal doctrines, which have emerged from the United States Supreme Court, have been instrumental in lower courts' opinions as to whether a former employee may assert a Fifth Amendment act-of-production privilege to avoid producing

business records; namely, the collective entity and the act-of-production doctrines.

In *Boyd v. United States*, 116 U.S. 616 (1886), the United States Supreme Court addressed whether the Fifth Amendment privilege against self-incrimination applied to the compelled production of an individual's "private papers." The *Boyd* Court held that the trial court's order directing the partners, and, thus, the owners of the goods sought to be forfeited, to produce a partnership invoice compelled them to be witnesses against themselves in violation of the Fifth Amendment. *See id*. at 634-35. According to the Court, ". . . any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime" is in violation of the Fifth Amendment privilege. *Id*. at 630.

After *Boyd*, the Court, in *Hale v. Henkel*, 201 U.S. 43 (1906), overruled in part by *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), articulated for the first time the collective entity rule. *See Braswell v. United States*, 487 U.S. 99, 105 (1988). The Court, in *Hale*, held that a corporation could not assert a Fifth Amendment privilege against self-incrimination to refuse to produce its corporate records. *See Hale*, 201 U.S. at 76-77. The *Hale* Court explained that ". . . there is a clear distinction . . . between an individual and a corporation, and the latter has no right to refuse to submit its books and papers for an examination at the suit of the State." *Id*. at 74. Thus, *Hale* distinguished itself from *Boyd* and ". . . carved an exception out of *Boyd* by establishing that corporate books and records are not 'private papers' protected by the Fifth Amendment." *Braswell*, 487 U.S. at 105. Yet, because the corporate officer in *Hale* had been granted immunity from prosecution, *see Hale*, 201 U.S. at 67-70, *Hale* did not address

whether a corporate officer could personally invoke the Fifth Amendment privilege against self-incrimination to resist a subpoena for corporate records. *See Braswell*, 487 U.S. at 105.

However, that question was answered in *Wilson v. United States*, 221 U.S. 361 (1911). In *Wilson*, the Court held that a corporate officer could not claim a Fifth Amendment privilege to refuse production of personally incriminating corporate records. *Id.* at 384-85. The Court reasoned that, because the documents were not the custodian's private papers, but were rather the corporation's, the custodian could not refuse to produce the documents, even if he had personally created the corporate documents himself. *Id.* at 378. Furthermore, the Court stated that where "the [custodian holds] the corporate books subject to the corporate duty," the custodian accepts the obligation to produce corporate documents. *Id.* at 384.

The holding in *Wilson* was expanded in *United States v. White*, 322 U.S. 694 (1944) to include not only corporations. In *White*, the Court held that a custodian of an unincorporated labor union's records could not assert a Fifth Amendment privilege to refuse production of the organization's records. *Id.* The *White* Court stated:

> [s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. . .. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. . . . But individuals, when acting as

> representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.

Id. at 699. Thus, since the documents in *White* were held by the custodian in his representative capacity, no privilege was found to exist. The test, as stated by the Court, as to whether or not an organization could invoke the Fifth Amendment privilege, is:

> [w]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

Id. at 701.

Further, in *Bellis v. United States*, 417 U.S. 85 (1974), the Court held that a law firm partner could not invoke the Fifth Amendment privilege to resist a subpoena asking for the partnership's financial records because he held the records in "a representative capacity." *See id.* at 101. Moreover,

regarding the test enunciated in *Boyd* for determining whether an organization may assert a Fifth Amendment privilege, the Court stated:

> [o]n its face, the test is not particularly helpful in the broad range of cases, including this one, where the organization embodies neither "purely ... personal interests" nor "group interests only," but rather some combination of the two.

Id. at 100. Hence, continued the Court, "[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Id.* at 100.

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court shifted the Fifth Amendment privilege analysis from the document's contents to the act of producing those documents. *Id.* at 431, 32 (Marshall, J., concurring). In *Fisher*, the Court held that an attorney could not invoke the Fifth Amendment privilege to resist production of his client's tax records, which had been prepared by the client's accountants. Under the *Fisher* Court's act-of-production doctrine, although a document's content may not be privileged under the Fifth Amendment, the act of producing the document, if "testimonial" and "incriminating," is where:

> [t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's

> belief that the papers are those described in the subpoena.

Id. at 410.

Subsequently, in *United States v. Doe*, 465 U.S. 605 (1984), using the act-of-production doctrine, the Court held that a sole proprietor could not be compelled to produce subpoenaed documents, without a grant of use immunity. *Id.* at 617. The *Doe* Court first acknowledged that the contents of the business records were not privileged under the Fifth Amendment:

> [r]espondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Id. at 611-12. But, although the Court found that the contents of the business records were not privileged, the Court still held that, if the act of producing the records would be testimonial and incriminating, then, without a statutory grant of use immunity, the sole proprietor could not be compelled to produce them. *Id.* at 617.

The Court, in *Braswell v. United States*, 487 U.S. 99 (1988), held that ". . . the custodian of corporate records may [not] resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment." *See id.* at 100. In so holding, the Court decided not to extend the act-of-production doctrine, developed in *Fisher*

and *Doe*, to corporate custodians. *Id.* at 109. Also, the Court found that the collective entity doctrine remained valid despite *Fisher*. *Id.* The *Braswell* Court used an "agency theory" to conclude that a person producing corporate documents acts as a corporation's agent, in a representative, rather than in a personal capacity. *Id.* at 109-10. Thus, according to the Court's decision, even if the act of production would be personally incriminating, under the collective entity doctrine, corporate custodians could not assert a Fifth Amendment privilege.

Following *Braswell*, lower courts have inconsistently applied either the collective entity or the act-of-production doctrine when deciding whether a former employee may assert a Fifth Amendment privilege to resist production of personally incriminating business documents. This, in turn, has given rise to a split in the circuits which continues to this day. Compare *In re Grand Jury Subpoena Dated Nov. 12, 1991 ("Paul")*, 957 F.2d 807, 813 (11th Cir. 1992) (per curiam) (former employee may not assert act-of-production privilege), and *In re Sealed Case*, 950 F.2d 736, 740 (D.C. Cir. 1991) (same), with *In re Three Grand Jury Subpoenas Duces Tecum dated January 29, 1999 United States of America v. John Doe #1, John Doe #2, John Doe #3* ("*John Doe*"), 191 F.3d 173 (2d Cir. 1999) (former employee may assert act-of-production privilege), and *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995) (same).

In *Paul*, the Eleventh Circuit relied on the collective entity doctrine and held that a former employee may not invoke his Fifth Amendment privilege against self-incrimination to avoid producing corporate documents. *Id.* According to the Eleventh Circuit,

> . . . we find that when Paul removed corporate documents from CenTrust and transferred them to

> his own possession, he assumed their custody in a representative capacity and retained the instant obligation to produce the corporate documents upon proper demand by the grand jury.

Paul, 957 F.2d. at 812. The Eleventh Circuit rejected an earlier Second Circuit case, *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, ("*Saxon Industries*"), 722 F.2d 981 (2d Cir. 1983), which extended the Fifth Amendment act-of-production privilege to former employees of a corporation to refuse to produce corporate records if such production would be incriminating. *Id*. at 811. The Eleventh Circuit assumed that the United States Supreme Court case of *Braswell v. United States*, 487 U.S. 99 (1988), which came after the *Saxon Industries* case, would somehow affect the viability of *Saxon Industries*. *Id*. As the *Paul* court stated, "[w]e first observe that the Second Circuit's decision in *Saxon Industries* predated the Supreme Court's decision in *Braswell*." *Id*. at 811.

On the other hand, inapposite to the holding in *Paul*, the Second Circuit Court of Appeals, in *John Doe*, 191 F.3d 173 (2d Cir. 1999), which was decided seven years after the aforementioned Eleventh Circuit case, held that a former employee has a Fifth Amendment act-of-production privilege to refuse to produce corporate records. In making its decision, the Second Circuit addressed the government's argument that *Saxon Industries* no longer remained good law following *Braswell*:

> [t]he question presented by this appeal, however, is different from that presented in *Braswell*. It is whether former employees of a corporation, who have corporate documents in their possession,

> may claim an act of production privilege notwithstanding *Braswell*. To hold, as the government suggests, that *Braswell* governs this appeal would require an extension of *Braswell* to the former employee based upon a conception that the former corporate employee who has corporate records holds them solely in a representative capacity, and acts as the corporation's agent when he or she produces them, even though the employment relationship has ended.
>
> [i]n *Braswell*, the Court addressed the question of whether a current corporate employee could claim a Fifth Amendment act of production privilege to refuse to produce corporate documents. The Court held that the employee — An officer of two closely-held corporations — who has been individually subpoenaed to produce corporate books and records could not invoke the Fifth Amendment to refuse production even though the documents might provide the government with evidence that could incriminate him.

Id. at 178-79. Thus, after finding that *Braswell* was limited to current employees, and that it did not implicate *Saxon Industries*, the court stated:

> . . . we hold that *Saxon Industries* remains good law and dictates the result in this case. Since Doe I, Doe II and Doe III are no longer employed by the corporation whose documents the government seeks, and therefore do not hold the corporate documents in a representational capacity, we

> conclude that each may claim a Fifth Amendment act of production privilege with respect to the documents called for in the 1999 subpoenas.

Id. at 183-184.

> The rule in *Braswell* was predicated on the rationale that corporate custodians hold and produce documents only in a representational capacity. . . . In the absence of . . . an agency relationship, the foundation upon which *Braswell* rests . . . is removed.

Id. at 181. The Second Circuit relied on traditional agency principles to determine that the former officers of the corporation, as former employees, no longer possessed the documents in a representative capacity:

> . . . once the agency relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records. When such an individual produces records in his possession he cannot be acting in anything other than his personal capacity.

Id. at 181.

In the present case, Mr. Slonimsky, as a former employee of what is a closed corporation, relies on the Court's *Braswell* decision, the Court's act-of-production line of cases, as well as the Second Circuit's *John Doe* decision, to assert that he has a Fifth Amendment act-of-production privilege to resist production of any incriminating documents called for in the summonses. In particular, like the facts in *John Doe* and

unlike the facts in *Braswell*, Mr. Slonimsky is a former employee. Moreover, the Second Circuit's analysis in *John Doe*, which reviewed the United States Supreme Court case law on both the collective entity and the act-of-production doctrines, is superior to that of the analysis in the Eleventh Circuit's *Paul* case, which is flawed. Hence, Mr. Slonimsky respectfully suggests that this Court hold that former employees, such as Mr. Slonimsky, may successfully assert a Fifth Amendment act-of-production privilege to avoid producing business records where such production is testimonial and incriminating.

The Eleventh Circuit, in affirming the district court as to Mr. Slonimsky, relies on the *Paul* case and its reasoning. The flaw in the Eleventh Circuit's *Paul* case is evident from a review of the case itself. For instance, the Eleventh Circuit's holding that former employees do not have a Fifth Amendment privilege to refuse to produce corporate records resulted in part from its failure to rely on the reasoning of the Second Circuit's *Saxon Industries* decision. The reason given by the Eleventh Circuit for not relying on *Saxon Industries* was that *Saxon Industries*, because it came before the United States Supreme Court case of *Braswell*, was not able to take the Court's *Braswell* decision into account. However, the Eleventh Circuit's reasoning for not relying on *Saxon Industries*, and, thereby, hold that former employees have a Fifth Amendment privilege to refuse to produce corporate records, namely, that *Saxon Industries* did not take the Court's *Braswell* decision into account, was invalidated when a later Second Circuit case, decided after *Braswell*, also extended the Fifth Amendment privilege to former employees of a corporation to refuse to produce corporate records if such production would be incriminating. *John Doe*, 191 F.3d 173.

Moreover, the trend in the circuits seems to be in the direction of extending the Fifth Amendment privilege to former employees. For instance, the Third and Ninth Circuits have also held that former employees of a corporation may claim a Fifth Amendment privilege against self-incrimination in refusing to produce corporate documents and or testimony. *See United States v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997) and *In re Grand Jury Proceedings*, 71 F.3d 723 (9th Cir. 1995); *but see In re Sealed Case (Government Records)*, 950 F.2d 736 (D.C. Cir. 1991).

In addition, the public interest also demands that former employees, such as Mr. Slonimsky, be entitled to assert an act-of-production privilege to resist production of self-incriminating documents. *See John Doe*, 191 F.3d 173 (2d Cir. 1999). In *John Doe*, the court addressed and logically answered any concerns regarding whether providing former employees with an act-of-production privilege would undermine "effective law enforcement" by "creat[ing] a perverse incentive for an employee to leave the corporation with the documents in his custody rather than comply with his legal obligation to produce the documents." *Id.* at 182. According to the court,

> . . . we believe the government overstates its case in this regard. *Saxon Industries* has been the law of this circuit since 1983, and *Braswell* was decided in 1988. The incentives have been in place for over a decade, with few reported incidents of employees stealing corporate documents and leaving a company's employ before or shortly after being served with a subpoena to produce such documents. Any such additional criminal behavior is fully sanctionable in an independent prosecution

> for theft or obstruction of justice and, upon conviction for any underlying federal crime, by enhanced penalties for obstruction of justice under federal sentencing guidelines. . .. Moreover, the corporation has an independent right to recover any of its missing documents in a replevin action and indeed, where it has agreed to cooperate with the government as in this case, it probably has a duty to do so. Finally, there is nothing in the Fifth Amendment that prevents the government from proceeding to recover the documents itself, without compelling their production by the person in possession, by means of a search warrant.

Id. at 182-83. The court further explained:

> [i]n any event, it is inherent in the Fifth Amendment's privilege against self-incrimination that a greater burden is placed on law enforcement than would otherwise be the case. If our determination of the Fifth Amendment's reach turned on the policy considerations of the sort advanced by the government, the basic protection against self-incrimination that the Founders prescribed in the Fifth Amendment would be substantially undermined.

Id. at 183. The Supreme Court, in *Boyd*, which was decided over a century ago, stated:

> [a]nd any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the

> principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

Id. at 631-32.

Hence, considering the precedent as a whole, the trend in the circuits, and the changes in jurisprudence, Mr. Slonimsky respectfully requests that this Court hold that former employees, such as Mr. Slonimsky, be able to successfully assert a Fifth Amendment act-of-production privilege to avoid producing business records where such production is testimonial and incriminating. An individual should not be deprived of his fundamental Fifth Amendment right simply because at one time he worked for a corporation.

CONCLUSION

Based on the foregoing cases, facts, and reasoning, it is respectfully requested that this Court grant certiorari and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 6, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14546
D.C. Docket No. 00-02321 CV-SH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN F. SLONIMSKY, as General Partner and/or Record Custodian of National Business Research Co. EIN #77-0315950, as President and/or Record Custodian of FL Corp. No. 96000002478, as General Partner and/or Record Custodian of National Business Research Company LTD EIN #65-0683044,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 6, 2001)

Before BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

BARKETT, Circuit Judge:

Martin F. Slonimsky, a taxpayer under investigation by the Internal Revenue Service (IRS), appeals the order granting

*Honorable Stephen N. Limbaugh, U.S. District Judge for the Eastern District of Missouri, sitting by designation.

the United States' Petition to Enforce Internal Revenue Service Summons for production of corporate records allegedly in his possession.

On appeal Slonimsky argues that because he is no longer an employee of the corporations, he need not produce the records in his possession. Thus, he claims that the district court erred in concluding that he could not invoke his Fifth Amendment privilege against self-incrimination and in granting the order to enforce the IRS summonses. Slonimsky's argument, however, has been foreclosed by *In re Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d 807 (11th Cir. 1992), wherein this Court held that

> [A]n individual may not invoke his personal Fifth Amendment privilege to avoid producing the documents of a collective entity that are in his custody, even if his production of those documents would prove personally incriminating. . . . [A] custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated. It is the immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity. Thus, the production of such documents is required regardless of whether the custodian is still associated with the corporation or other collective entity.

Id. at 809, 812.[1] *See also Braswell v. United States*, 487 U.S. 99, 111-112 (1988); *Bellis v. United States*, 417 U.S. 85, 88

1. Moreover, as far back as *Grant v. United States*, 227 U.S. 74, 80 (1913), and *Wheeler v. United States*, 226 U.S. 478, 490 (1913), (Cont'd)

n. 3 (1974); *Grant*, 227 U.S. at 80 (1913); *Wheeler*, 226 U.S. at 490; *In re Grand Jury Witnesses*, 92 F.3d 710, 713 (8th Cir. 1996); *In re Sealed Case (Government Records)*, 950 F.2d 736 (D.C. Cir. 1991). *Contra In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999) (holding that former employees can invoke Fifth Amendment privilege because "once the agency relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records. When such an individual produces records in his possession he cannot be acting in anything other than his personal capacity"); *In re Grand Jury Proceedings*, 71 F.3d 723 (9th Cir. 1995) (adopting Second Circuit rule without analysis).

Accordingly, the district court's order is

AFFIRMED.

(Cont'd)
the Supreme Court held that the dissolution of a corporation does not change the essential character of its records. Thus, individuals who possessed documents of the defunct corporations could not invoke the privilege to avoid producing the corporate documents. *See id.* Slonimsky argues that part of the reasoning behind these decisions — that a corporation has limited powers granted by the State and thus the State has "visitorial powers" to investigate a corporation's activities — is no longer relevant. However, any suggestion that this was the only reason for the collective entity doctrine was put to rest in *United States v. White*, 322 U.S. 694 (1944), where the Supreme Court announced the general rule that the privilege could not be employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. *Id.* at 699-700 (extending reasoning of collective entity doctrine to labor unions).

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14546

District Court Docket No.
00-02321-CV-SH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN F. SLONIMSKY, as General Partner and/or Record Custodian of National Business Research Co. EIN #77-0315950, as President and/or Record Custodian of FL Corp. No. 96000002478, as General Partner and/or Record Custodian of National Business Research Company LTD EIN #65-0683044,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 6, 2001
For the Court: Thomas K. Kahn, Clerk
By: Meoli, Anthony

ISSUED AS A MANDATE: August 29, 2001

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING PETITION TO ENFORCE IRS SUMMONSES DATED AUGUST 23, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 00-2321-CIV

UNITED STATES OF AMERICA,

Petitioner

v.

MARTIN F. SLONIMSKY, as General Partner and/or Records Custodian of National Business Research Co., (EIN # 77-0315950), as President and/or Records Custodian of National Business Research Co. (FL Corp. No. 96000002478), as General Partner and/or Records Custodian of National Business Research Company Ltd. (EIN 65-0683044),

Respondent.

Aug. 23, 2000

[*Code Sec. 7602*]

ORDER GRANTING PETITION TO ENFORCE IRS SUMMONSES

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HIGHSMITH, J.

THIS CAUSE came before the Court upon the government's petition to enforce three Internal Revenue Service summonses served upon Martin F. Slonimsky in his capacity as records custodian and/or officer of the above-named entities. Slonimsky filed an objection to the petition and the Court held a hearing on this matter on August 18, 2000. Having carefully considered the arguments advanced by Slonimsky in his written submission and at the hearing, the Court finds it appropriate to grant the government's petition. The Court has also considered Slonimsky's ore tenus motion for a stay of its ruling pending appeal, but finds no justification for granting such relief.

PROCEDURAL BACKGROUND

On March 21, 2000, Internal Revenue Service Special Agent George O. Brito issued and served three summonses directing Martin F. Slonimsky, in his capacity as records custodian and/or officer of National Business Research Co. and National Business Research Company Ltd., to appear at the local Internal Revenue Service Office to give testimony and produce certain documents of these companies. Specifically, the summonses require production of the companies' financial records for the years 1995 through 1997 in connection with an investigation being conducted by Agent Brito into Slonimsky's federal income tax liability for those years. Agent Brito is also inquiring into potential offenses connected with the administration or enforcement of the Internal Revenue laws for the years in question.

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On April 3, 2000, the day before Slonimsky was to appear, his counsel informed Agent Erito that Slonimsky would not comply with the summonses and that he was asserting his fifth amendment privilege against self-incrimination. Thereafter, the government commenced this action, seeking an order directing Slonimsky to show cause why he should not fully comply with the summonses and an order directing Slonimsky to comply. On July 5, 2000, the Court issued the show cause order, setting the matter for hearing on August 10, 2000. Pursuant to the agreement of counsel, the hearing was postponed to August 18, 2000.

DISCUSSION

In Re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807 (11th Cir.1992) provides clear guidance to this Court regarding the issue of compelled production of corporate records:

> The Supreme Court has held that a corporation has no Fifth Amendment privilege to refuse to produce its records. Because a corporation can only produce its records through its human representatives, the corollary to this rule is that a corporate representative may not invoke his personal Fifth Amendment privilege to shield corporate records from a subpoena. This principle is known as the "collective entity doctrine."

In Re Grand Jury Subpoena, 957 F.2d at 810 (citing, *inter alia*, *Braswell v. United States* [88-2 USTC ¶ 9546], 487 U.S. 99 (1988)). Thus, under Eleventh Circuit law, "an individual

may not invoke his personal Fifth Amendment privilege to avoid producing the documents of a collective entity that are in his custody, even if his production of those documents would prove personally incriminating." *Id.* at 809. Moreover,

> a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated. It is the immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity. Thus, the production of such documents is required regardless of whether the custodian is still associated with the corporation or other collective entity.

Id. at 812.

The grounds asserted by Slonimsky for resisting the Internal Revenue summonses is that both National Business Research Co. and National Business Research Company Ltd. are no longer in existence and are closed. Thus, Slonimsky argues, he is no longer associated, affiliated, employed, a partner, officer, or records custodian of these corporation. Slonimsky acknowledges that the law of the Eleventh Circuit, as set forth above, is contrary to his position and relies instead on *In Re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d 173 (2nd Cir.1999). In that case, the Second Circuit upheld a fifth amendment act of production privilege claim by former employees holding corporate documents. According to the Second Circuit,

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> In the absence of legal authority to the effect that a former employee remains an agent of the corporation, or any evidence that the corporation and the individual intended to maintain an agency relationship, the foundation upon which *Braswell* rests-that one who is currently employed by the corporation holds documents as an agent in a custodial capacity so that it is actually the corporation that is producing the records-is removed.

In Re Three Grand Jury Subpoenas, 191 F.3d at 181.

As may be gleaned from the foregoing citations, the Second circuit's analysis of this issue proceeds from the different foundation than the Eleventh Circuit's. The Second Circuit predicates the obligation to produce corporate documents on the continued existence of an agency relationship between the holder of the documents and the corporation. In the Eleventh Circuit's view, however, it is the nature of the documents that renders the act of production by their holder to be a representative one, regardless of the person's current status vis-à-vis the corporation. The doctrine of *state decisis* requires this Court to apply the Eleventh Circuit's rationale and thereby reject Slonimsky's fifth amendment act of production privilege claim. Accordingly, the Court grants the government's petition to enforce the Internal Revenue Service summons. Moreover, since this determination is predicated on clearly articulated precedential law, the Court declines Slonimsky's request for a stay pending appeal.

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CONCLUSION

Based on the foregoing considerations, it is ORDERED AND ADJUDGED that, within thirty days from the date of this Order, Martin F. Slonimsky, in his capacity as records custodian and/or officer of National Business Research Co. and National Business Research Company Ltd. shall comply with the three Internal Revenue Service summons issued and served upon him by Special Agent George O. Brito on March 21, 2000. It is further

ORDERED and ADJUDGED that Slonimsky's ore tenus motion for a stay of this ruling pending appeal is DENIED.

DONE AND ORDERED.